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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARK BLIZZARD,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B231822

(Los Angeles County
Super. Ct. No. BS124063)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Ann I. Jones, Judge. Reversed and remanded with directions.

Silver, Hadden, Silver, Wexler & Levine, Susan Silver and Michael Simidjian
for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney and Brian I. Cheng, Deputy City Attorney,
for Defendants and Respondents.

Los Angeles Police Department (Department) Officer Mark Blizzard appeals from the order of the trial court denying his petition for writ of administrative mandate (Code Civ. Proc., § 1094.5), challenging his downgrade and transfer. Officer Blizzard had been charged with seven acts of misconduct regarding the unnecessary use of force arising out of a crowd control incident. As a result of the charges he: (1) requested a Board of Rights hearing, to determine whether he should be disciplined; and (2) was also administratively downgraded and transferred. The Board of Rights found him not guilty of five acts of misconduct, but guilty of two, and recommended the discipline of an official reprimand, which was implemented. Thereafter, Officer Blizzard proceeded to an administrative hearing regarding his downgrade and transfer. The hearing officer concluded that, as Officer Blizzard was guilty of only two counts of misconduct, his misconduct did not justify the downgrade and transfer. The Chief of Police disagreed, rejected the hearing officer's recommendation, and confirmed the downgrade and transfer. Officer Blizzard sought writ review of the decision of the Chief of Police, arguing that the Department failed to comply with its own rules for administrative downgrades, and that the evidence did not support the Chief's decision. The trial court denied the writ petition. We agree with Officer Blizzard that the evidence did not support the downgrade under the Department's rules, and will therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. Officer Blizzard's Employment Prior to the Incident

Officer Blizzard joined the Department in December of 1990. He was classified as a Police Officer, and his pay grade, after an original probationary period, was P.O. II.

In 1996, Officer Blizzard advanced to the next pay grade, P.O. III. At this time, he was assigned to the Foothill Division.

By all accounts, Officer Blizzard was an exemplary officer. His September 1997 annual performance evaluation report was overwhelmingly positive. His immediate supervisor indicated that Officer Blizzard “has superseded my expectations as a peer leader, team player, and as a training officer.” He was described as “the ideal of police professionalism.” At that point in time, Office Blizzard had “only one goal,” which was to become a member of the Metropolitan Division. Officer Blizzard achieved that goal in June 1998. In his final review at Foothill Division, his immediate supervisor stated: “Because of his leadership traits, he requires minimal supervision. Officer Blizzard can always be counted on to make appropriate decisions on a daily basis.”

In his first or second review¹ at Metropolitan Division, his immediate supervisor stated that, during this rating period, “Blizzard continues his outstanding performance in all aspects of the Metro Mission.” His immediate supervisor noted that, during the Democratic National Convention, Officer Blizzard was assigned to the Primary Tactical Support Element, which was deployed when confronted with violent protestors. “In

¹ At the administrative hearing, Officer Blizzard testified that Exhibit H consisted of the “sum total of all [his] performance evaluation reports from December of 1996 to the present time.” This appears to be mistaken. There is no review for the key period in 2007 when the relevant acts of misconduct occurred. Moreover, it is not clear whether the record is missing a review for Officer Blizzard’s first months, or year, at Metropolitan Division. Upon his transfer, the Foothill Division completed a review covering the period ending June 6, 1998. The next review in the record is identified as an “Annual” review from Metropolitan Division. It is indicated as covering the period from September 1, 1999 to August 31, 2000. However, it also indicates that the period covered is “24 months.”

skirmish line configuration, Blizzard and his fellow element members were able to disperse the crowd and restore order. Blizzard played a major role in its success with his teamwork and platoon integrity.”

In his next annual review, for the period ending August 31, 2001, Officer Blizzard was again reviewed in the most glowing terms. Indeed, where the form asks the reviewer, “How can this employee best improve his/her performance?” Officer Blizzard’s immediate supervisor wrote, “Officer Blizzard is an experienced Metropolitan Officer, he can best improve his performance by taking on more challenges and promote.”

The following year, Officer Blizzard’s performance was again “exemplary.” His immediate supervisor stated that, “[w]hen given details, [Officer Blizzard] makes consistently high quality decisions that are always in the best interests of the Department and the community.” He was again encouraged to seek promotion, “as his initiative, interpersonal skills, maturity, and leadership would benefit the Department.”

Over the next review period, Officer Blizzard “continued to display the outstanding level of performance, dedication and work ethic that has been his previously established standard.” During anti-war protests in 2003, he “was instrumental in attaining the ultimate successes gained in dealing with hundreds, if not thousands, of agitated demonstrators.” His immediate supervisor summarized, “Officer Blizzard consistently distinguishes himself as a highly motivated, talented individual with strong leadership capabilities and tremendous potential for future advancement. He is an outstanding representative of this platoon, this division and this department.

Blizzard has been and will continue to be an asset to this department and this city. His service to the citizens of this community is in the highest traditions of the Los Angeles Police Department.”

The following year, Officer Blizzard was again reviewed enthusiastically. He was identified as having “strong tactical skills” and, indeed, was a “trainer on the Mobile Field Force training cadre that is responsible for preparing the patrol divisions for crowd control situations.”

He continued as a Mobile Field Force trainer in the following review period. Overall, he was described as “an outstanding officer and an asset to both Metropolitan Division and the Department.”² His immediate supervisor explained, “In each assignment, Blizzard has performed at a level that exceeds the already high expectations of a Metro officer.”

Officer Blizzard’s final performance review prior to the relevant incident of misconduct covered the period from December 1, 2005 through November 30, 2006. During the review period, he continued as a training officer on the Mobile Field Force training cadre. He was again reviewed as an “outstanding” officer. His immediate supervisor explained, “Blizzard maintains a professional demeanor in the field and is a sought after partner in the platoon. He is well thought of by his peers and supervisors and has a positive impact on the morale of the platoon. Blizzard has strong tactical skills and an in-depth knowledge of Department Policy and Penal Law.”

² This page from the review for the period September 1, 2004, to November 30, 2005, has a header indicating it covered the previous year. We assume the header is simply incorrect, as the page refers to a commendation dated September 24, 2004.

Overall, his reviews indicate no disciplinary actions.³ He has received dozens of commendations and favorable incident reports.

2. *The May Day Protest and its Aftermath*

On May 1, 2007, up to 10,000 people gathered at MacArthur Park, after a planned demonstration. Among the crowds were agitators, as well as peaceful demonstrators. At some point, individuals in the crowd began to throw rocks and bottles – including frozen water bottles – at police. An unlawful assembly was declared and a dispersal order was given. Officer Blizzard was part of a platoon given the mission to clear the park. The officers formed a skirmish line and started to move the crowd forward. The crowd was “unruly and volatile.” During the attempt to clear the park, many officers, including Officer Blizzard, used some degree of force. Multiple videos of the conflict were made by the news media, some of which were apparently aired on television.

The May Day incident resulted in a report by the Department to the Board of Police Commissioners, dated October 9, 2007. According to that report, as a result of the incident, Chief of Police William Bratton “needed to restore confidence in the Department’s ability to handle future events.” Chief Bratton directed Deputy Chief Hillmann⁴ to review the events of the May Day incident, and prepare a new training program for all Metropolitan Division officers and supervisors. Deputy Chief Hillmann

³ Throughout his entire tenure with the Department, he was apparently “involved in five preventable traffic collisions and one failure to qualify.”

⁴ Deputy Chief Hillmann was the Department’s expert in crowd management. He is nationally recognized as an expert in this field.

immediately brought together a team of Department experts to review the events and “identify issues in regard to command, control, use of force and tactics.” The team identified several immediate training areas, including, “fragmented planning, lack of unity of command, poor operational coordination, ineffective communications, fragmented interpretation of use of force policy in crowd control situations, no arrest posture, poor tactics, [and] lack of understanding of the media’s role and the Department’s responsibility to the media.”

“During the delivery of this training, it became evident that there was confusion regarding what ‘aggressive and/or combative’ meant when describing the actions of an unruly crowd. The 1996 Department Training Bulletin became the source document that appeared to create confusion.” Apparently, the document identified several actions which could be categorized as aggressive or combative, but “nowhere does the bulletin provide a clear definition of aggressive or combative behaviors.”

Deputy Chief Hillmann was then tasked to develop Department-wide Mobile Field Force and crowd control training to “incorporate all of the lessons learned from May Day 2007.” A “train-the-trainer” course was developed to train the supervisors and officers selected to train on the new curriculum. All instructors were required to attend the “train-the-trainer” course prior to teaching the new crowd management courses.

3. *The Charges Against Officer Blizzard*

An internal investigation of the officers' use of force on May Day 2007 was conducted, and disciplinary charges were ultimately brought against multiple officers, including Officer Blizzard.

The timing of the following procedural events is significant, but not entirely clear from the record. At some point between June and August 2008, Officer Blizzard was served with a Notice of Proposed Disciplinary Action,⁵ in which he was charged with seven counts of the use of unauthorized force. He sought, as was his right, a hearing before a Board of Rights.⁶ The process for disciplining an officer, including a Board of Rights hearing, is set forth in section 1070 of the Los Angeles City Charter. This section governs removal, suspension, demotion in rank, and reprimand. Demotion refers to a reduction in an officer's civil service classification. "The provisions of this section shall not apply to reductions in pay grade or similar personnel actions caused by reassignment, deselection from bonused positions, and the like. Such personnel actions shall be administered under policies adopted by the [D]epartment." (L.A. Charter,

⁵ Pursuant to Los Angeles City Charter, section 1070(c), the complaint must be filed within one year after the misconduct's discovery, although several exceptions may apply. One such exception applies "if the investigation involves more than one employee and requires a reasonable extension. . . ." (L.A. Charter, § 1070(c)(4).)

⁶ In Officer Blizzard's opening brief on appeal, he states that he was served with a Notice of Proposed Disciplinary action on June 26, 2008. The Board of Rights would ultimately issue its decision in June 2009. The caption of that decision states "DATED AUGUST 29, 2008." The date to which it refers is unclear. Indeed, the text of the decision states that a hearing was held on the complaint filed with the Board of Police Commissioners "on September 24, 2008."

§ 1070(n).) The Department has set forth these policies in Department Manual former Sections 3/763.55 and 3/763.60.⁷

4. *Officer Blizzard's Downgrade and Transfer*

While disciplinary proceedings were pending against Officer Blizzard, simultaneous personnel action was taken against him to reduce his pay grade and transfer him out of Metropolitan Division. Under Department Manual Section 3/763.60, there were two ways in which to reassign an officer to a lower pay grade, the general procedure and what is known as the "Exception." The general procedure involves counseling the officer regarding deficiencies and completing a "Notice to Correct Deficiencies." If the officer "continues to demonstrate a failure to satisfactorily perform the duties of the position," the officer may then be downgraded. There is no dispute that such general procedure was not applied in this case; Officer Blizzard was not counseled or given a Notice to Correct Deficiencies. The Exception, however, allows the Department to downgrade an officer without providing the officer with a second chance. It states, "When an officer clearly demonstrated [*sic*] failure or inability to satisfactorily perform the duties of his or her advanced paygrade position, indicate the need for an immediate reassignment in the best interests of the Department, the commanding officer

⁷ The Department has since modified its policies. When we refer to sections 3/763.55 and 3/763.60, we refer to the sections applicable at the time of Officer Blizzard's transfer and downgrade, unless otherwise indicated.

shall temporarily place the officer in a lower paygrade assignment and shall, without delay,” file the necessary forms for reduction in pay grade.”⁸

No attempt was made to transfer or downgrade Officer Blizzard until after the charges were filed against him in the summer of 2008. In the interim, he remained at Metropolitan Division at the pay grade of P.O. III. In his performance evaluation covering the period from December 1, 2007 through November 30, 2008,⁹ it was noted that “[d]uring this rating period Blizzard has been given a wide variety of assignments that include but are not limited to[], crime suppression, diplomatic and witness protection, *crowd control and crowd management*, tactical support elements and immediate action and rapid response units.” (Emphasis added.) He was described as “always at the ready to handle any situation presented, small or large, complicated or simple with the utmost integrity.” While the report does not specifically indicate whether Blizzard took part in the revised training implemented in the aftermath of the May Day incident, it does state that, “[a]s new training methods are introduced to the platoon, Blizzard is always eager and willing to implement the changes in his normal duties.”

⁸ Similarly, Department Manual Section 3/763.55 permits the transfer of an officer when the officer “ ‘clearly demonstrates his/her failure or inability to satisfactorily perform the duties of the position.’ ” (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 171.)

⁹ As noted above (see fn. 1, *ante*), the record does not include Officer Blizzard’s performance evaluation for the period from December 1, 2006 through November 30, 2007, which encompasses the May Day incident.

On August 28, 2008, Captain Jeffrey Greer, Commanding Officer of Metropolitan Division, requested Officer Blizzard be administratively downgraded to P.O. II and transferred out of Metropolitan Division,¹⁰ under Department Manual Sections 3/763.55 and 3/763.60. This was requested “due to a sustained personnel complaint¹¹” against Officer Blizzard for serious misconduct during a crowd control incident. [¶] The actions displayed by Officer Blizzard in this incident clearly demonstrate that he can no longer satisfactorily perform the duties of a Metropolitan Division Officer.” It was further explained that, “[o]ne of Metropolitan Division’s primary responsibilities is crowd control. Because the misconduct on the part of Officer Blizzard occurred during a crowd control situation, deploying him to future similar events would expose the Department to significant civil liability.” The request for transfer was approved by Deputy Chief Richard Roupoli, Commanding Officer of Special Operations Bureau.

Officer Blizzard was not the only Metropolitan Officer downgraded and transferred as a result of the May Day incident; three other officers were also downgraded and transferred. At one point, it was decided that the downgrade and transfer of all four officers would be held in abeyance until after the Board of Rights

¹⁰ Officer Blizzard challenged the downgrade and transfer. However, he indicated that if he were to be transferred, his first choice was to be transferred to Devonshire Division. Ultimately, he was transferred to that division.

¹¹ This language is somewhat misleading. The personnel complaint had not yet been adjudicated by the Board of Rights. To the extent the complaint had been “sustained,” it had been sustained only by the internal investigation.

hearings had been completed for each officer.¹² However, it was ultimately decided, by Chief Bratton, to downgrade and transfer all four officers immediately.¹³ Officer Blizzard's transfer was ultimately implemented on November 9, 2008.

5. *The Board of Rights Decision*

The Board of Rights held a hearing on the disciplinary charges against Officer Blizzard. At the hearing, the Department had the burden of proving each charge by a preponderance of the evidence. (L.A. Charter, § 1070(l).) Officer Blizzard was found not guilty of five counts of the use of unauthorized force, but guilty of two counts of the use of unauthorized force. Specifically, it was concluded that Officer Blizzard was not guilty of the use of unauthorized force against non-media civilians.¹⁴ The two counts of

¹² A "Note" to the Exception in Department Manual Section 3/763.60 states, "When the actions which demonstrate the officer's failure or inability to satisfactorily perform the duties of his or her position also result in the initiation of a complaint, the reassignment to a lower paygrade position normally shall be accomplished prior to the adjudication and disposition of the complaint."

¹³ Again, the dates in the record are not as clear as they could be. It appears that Deputy Chief Roupoli loaned the officers, including Officer Blizzard, to Air Support tower operations, and they were subsequently transferred to their new divisions directly from Air Support. The date of the transfer to Air Support is not clear from the record. Officer Blizzard's verified complaint states that he was loaned to Air Support on or about July 1, 2008. However, his opening brief on appeal states, "[f]ollowing August 28, 2008, and before the effective date of the transfer, [he] was loaned to the Air Support Unit."

¹⁴ One issue raised at the hearing was whether Officer Blizzard "stepped out of the skirmish line" to deliver an unnecessary push to a civilian. It was argued that the push was an unauthorized use of force *because* Officer Blizzard stepped out of the line to deliver it. The members of the Board of Rights "carefully reviewed the video . . . and were unable to view the entire skirmish line to form an opinion of whether Officer Blizzard had gone out of his way to leave the skirmish line." The Board felt that the testimony was consistent with the skirmish line moving in the direction of the individual

which he was found guilty related to the use of unauthorized force against members of the media. As found by the Board of Rights, the Department had issued a training bulletin in 2002 indicating that “ ‘the media has the right, without interfering with police operations, to cover events that may result in the declaration of an unlawful assembly and order to disperse. The Department will make reasonable efforts to accommodate this reporting obligation; however, such efforts will be made consistent with the Department’s primary objective to restore or maintain order.’ ” As the use of force against a member of the media “has the potential to send a chilling [e]ffect throughout the community and have an adverse [e]ffect on the image of the Department, . . . the use of force on a member of the media must . . . be a last resort of the Department.” The Board of Rights concluded that Officer Blizzard’s use of force against two members of the media was not reasonable and the last resort; instead, accommodation could have been made for the two individuals, who were “readily identifiable as camera men [*sic*] of reputable news agencies.”

As to the issue of penalty, the Board of Rights recommended that Officer Blizzard be officially reprimanded.¹⁵ The Board of Rights concluded that Officer

in question, and ultimately found Officer Blizzard not guilty of using unauthorized force against him.

¹⁵ The Board also recommended that Officer Blizzard receive immediate training in Mobile Field Force tactics and use of force policy, specifically in regards to crowd control. It further recommended that he be loaned to Media Relations for the next major event “to fully understand the relationship between the Department and the media.” The Board also indicated that if, within three years, Officer Blizzard is involved in similar misconduct, he should receive a penalty ranging from 20 days suspension to removal from the Department.

Blizzard was an outstanding officer, who was remorseful and contrite. The Board found that Officer Blizzard's actions were not malicious and neither of the cameramen was seriously injured.

Pursuant to Los Angeles City Charter, section 1070(p), the Chief of Police "shall either uphold the recommendation of the Board of Rights or may, at his or her discretion, impose a penalty less severe than that ordered by the Board [of] Rights, but may not impose a greater penalty."¹⁶ On July 14, 2009, the acting Chief of Police upheld the recommendation, and Officer Blizzard was reprimanded.

6. *Administrative Challenge to Officer Blizzard's Downgrade and Transfer*

An officer has the right to administratively challenge a downgrade and transfer. The procedure involves an administrative hearing, before a single hearing officer. The hearing officer's decision is then reviewed by the Chief of Police, who has discretion to accept or reject the hearing officer's recommendation.

On August 9, 2009, a hearing was held on Officer Blizzard's administrative challenge to his downgrade and transfer. Officer Blizzard's hearing was conducted

¹⁶ Officer Blizzard's petition for administrative mandate, challenging his downgrade and transfer, proceeded before two different trial court judges. The first judge, Hon. David P. Yaffe, sought additional briefing on the issue of whether Los Angeles City Charter, section 1070(p) barred the transfer and downgrade as an improper increase of penalty for the misconduct established before the Bill of Rights. The case was subsequently reassigned to Hon. Ann I. Jones. Judge Jones disregarded the supplemental briefing sought by Judge Yaffe. On appeal, Officer Blizzard argues that the downgrade and transfer were, in fact, barred by Los Angeles City Charter, section 1070(p). This is incorrect. As discussed above, the Charter clearly and expressly provides for two separate proceedings: a disciplinary proceeding, and an administrative proceeding governing transfers and downgrades. (L.A. Charter, § 1070(n).)

before Captain Joseph Curreri. At the start of the hearing, it was agreed that the Department bore the burden of proof.¹⁷ It was understood that the Department had proceeded under the “Exception” in Department Manual Section 3/763.60.¹⁸ Thus, the Department was required to establish that Officer Blizzard had “clearly demonstrated [a] failure or inability to satisfactorily perform the duties of his . . . advanced paygrade position, [which] indicate[s] the need for an immediate reassignment in the best interests of the Department.” However, for reasons which are unclear from the record, the parties focused solely on whether Officer Blizzard had the ability to satisfactorily perform the duties of a P.O. III in Metropolitan Division, and *not* on whether any alleged failure or inability to perform those duties was of such a degree as to indicate the need for an immediate reassignment.¹⁹

¹⁷ Captain Curreri initially stated that the Department bore no burden of proof and was required to introduce no evidence. Representatives for both the Department and Officer Blizzard pointed out that the law had changed, and the Department was required to establish the requirements for the downgrade. This was correct. (*Brown v. City of Los Angeles*, *supra*, 102 Cal.App.4th at p. 176; *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 92-93.)

¹⁸ Before the trial court, but not before this court, the Department suggested that Officer Blizzard failed to establish that the Department relied on the Exception, as one witness’s testimony on the point was somewhat ambiguous. The argument is meritless. There is no evidence that that general procedure for a downgrade was followed. Indeed, there is no evidence whatsoever that Officer Blizzard was downgraded for a second act of misconduct after having been counseled for the first one. Moreover, both Captain Curreri and Chief Bratton believed that Officer Blizzard was downgraded pursuant to the Exception.

¹⁹ Indeed, in Officer Blizzard’s representative’s opening statement at the hearing, he argued, “There is an Exception clause or Emergency clause as it’s called and that clause states that because of one singular act that occurs that’s so horrendous in its nature, that singular in and of itself shows that the officer cannot satisfactorily perform

Even with the issue so limited, the Department's evidence was somewhat minimal. Initially, the Department intended to rely on the testimony of Captain Dennis Kato. Although Captain Greer had signed the request to transfer Officer Blizzard, he had done so with the agreement of Captain Kato. According to the Department's representative, "Captain Kato has knowledge in part and parcel to this entire incident [and] can speak on behalf of the Department on this matter Captain Kato will be coming in to testify, but all parties agree, including the Department, Captain Kato is spokesperson for the Department on this matter." To the clear surprise of the Department's representative, however, Captain Kato testified unambiguously that, knowing the findings and rationale of the Board of Rights, "I would not have downgraded [Officer Blizzard] and I would not have asked for an administrative transfer out of Metro." Captain Kato testified that he has the "utmost faith" that Officer Blizzard could perform the duties of a P.O. III at the Metropolitan Division, and is willing to have Officer Blizzard return to Metropolitan Division to be within his chain of command. Captain Kato explained that part of his rationale was that he currently has officers under his command at Metropolitan who had been disciplined for similar

his duties as a Police Officer III, and then . . . is downgraded." He made no mention of the requirement that the singular act be of a character as to indicate a need for *immediate* reassignment. Instead, the crux of his argument was that the one act – in this case, the two sustained counts of unauthorized force against the media – was not sufficient to establish that Officer Blizzard could not satisfactorily perform the duties of a P.O. III in Metropolitan Division, given his years of exemplary performance in that position.

misconduct arising from the May Day incident.²⁰ Captain Kato also testified that the May Day incident brought to light problems in Metropolitan Division's policies regarding crowd control, which have since been resolved. He believed that if Officer Blizzard was retrained pursuant to the new standards, there was no reason to believe that he could not follow them.

Having had its "spokesperson" testify that the downgrade and transfer should *not* be upheld, the Department sought, and was granted, permission to call an additional witness, Deputy Chief Roupoli. Deputy Chief Roupoli testified that, both at the time he approved Officer Blizzard's downgrade and transfer, and at the present time, "Officer Blizzard's judgment with respect to the May Day [incident] was faulty and not the type of attitude or judgment I want in the Metropolitan Division." Deputy Chief Roupoli's testimony was based on his review of the videotapes of the May Day incident.²¹ The videotapes themselves were not introduced into evidence. Moreover, it is apparent that Deputy Chief Roupoli's opinion was not based exclusively on the two acts of use of unauthorized force of which Officer Blizzard had been found guilty, but was also based on the five acts of which he had been acquitted. Deputy Chief Roupoli explained that from his review of the videotapes, Officer Blizzard's judgment was lacking "on several occasions." When asked to explain why Officer Blizzard was downgraded and transferred while other officers implicated in the May Day incident were not, Deputy

²⁰ Captain Kato explained that Officer Blizzard's "downfall is no greater no less than the people I still have working under my command."

²¹ It was apparent from Deputy Chief Roupoli's testimony that he had not reviewed the videotapes recently.

Chief Roupoli testified, “I think the difference [was] Officer Blizzard and one other officer had *numerous encounters* that were – that in my judgment were inappropriate, and focused on their thought process and their judgment. He was one of two that I focused on the most with a *number of incidents* that he was involved in from what I saw. And that’s what I based my opinion on.” (Emphasis added.) When the issue arose as to whether Deputy Chief Roupoli was, in fact, relying on the five incidents of which Officer Blizzard was acquitted, Deputy Chief Roupoli testified, “I’m giving you my opinion based on what I looked at, what I read for his statement and what I saw on videos that I looked at numerous times. My opinion is his judgment was faulty. If I remember right and I may be wrong what I seem to realize that he even broke once or twice from the line. I can’t say that for certainty because I looked at a lot of the tapes.”^[22] That seems to stick in my mind, and based on that I believe the judgment that he used was faulty, and that’s what I’m basing my opinion on.” When Captain Curreri (the hearing officer) specifically asked why Officer Blizzard was treated differently from other officers who were found guilty of similar acts of misconduct but not downgraded and transferred, Deputy Chief Roupoli responded, “You are absolutely right. There are officers that have one or two counts of unauthorized force [who] received from admonishment to a day [suspension], and I think in one case an officer who received five days [suspension] for probably one count. In this particular case[,]

²² The Board of Rights, in fact, had been unable to form an opinion as to whether Officer Blizzard had gone out of his way to leave the skirmish line, and acquitted him of the count of unauthorized force which relied on the theory that he had left the line. (See fn. 14, *ante*.)

what I saw on the video[--]and I understand he was found not guilty of five of those seven[--]but what I saw on the video concerns me, and that's what I stand on, and that's what I have issue[s] with respect to his judgment.”

The Department had no further witnesses. In his defense, Officer Blizzard introduced his years of positive reviews and commendations. He introduced the testimony of: Sergeant Gerald Lee, who was his supervisor at Metropolitan Division for over four years; Sergeant David Carter, who supervised him at Metropolitan Division and continues to supervise him in connection with certain ancillary duties;²³ and Lieutenant Roger Murphy, who was his platoon leader at Metropolitan Division from shortly before the May Day incident. Each of them enthusiastically testified that Officer Blizzard can perform the duties of a P.O. III at Metropolitan Division, regardless of the events for which he was disciplined. Officer Blizzard also testified in his own behalf, testifying that he had learned from the incident, and would definitely make exceptions for the media if a similar incident occurred in the future.

7. The Hearing Officer's Recommendation

On August 7, 2009, Captain Curreri issued his finding “by more than a preponderance of the evidence that the Department absolutely did NOT meet its burden of proof to justify the downgrade of Officer Blizzard.” Captain Curreri stated that there “was absolutely no evidence presented during the hearing which indicated that

²³ Sergeant Carter supervises Officer Blizzard as part of the “boat operations” for the Department’s underwater dive unit.

Officer Blizzard is unable to satisfactorily perform the duties of a [P.O. III] assigned to Metropolitan Division.

Captain Curreri also concluded that the evidence “clearly showed” a lack of fairness and consistency in treatment of officers involved in transgressions arising from the May Day incident. Captain Curreri strongly recommended that Officer Blizzard be reinstated and returned to Metropolitan Division.

8. *Chief Bratton’s Decision*

On September 15, 2009, Chief Bratton issued his decision rejecting Captain Curreri’s recommendation. In a blistering two-page opinion, the Chief concluded that there “is sufficient cause to support the removal of Officer Blizzard” from his P.O. III position pursuant to the Exception clause of Department Manual section 3/763.60. Specifically, Chief Bratton concluded that the fact that Officer Blizzard was found guilty of, and reprimanded for, two acts of unauthorized force was *itself* sufficient to justify the downgrade and transfer. Chief Bratton stated, “On the occasion of May 1, 2007, [Officer Blizzard] did in fact fail to satisfactorily perform the duties of his position: he was found guilty of Unauthorized Force in a Board of Rights. He had a duty as a Metropolitan Division Officer to use only authorized force. The hearing officer was flatly wrong in his opinion. Any misconduct involving force is a failure to satisfactorily perform the duties of a position requiring the use of force, which in this case the position clearly did. The hearing officer could not have been more wrong in his analysis on this point.”

Chief Bratton further concluded that fairness with respect to the way in which other officers were treated was not a relevant issue. Instead, the issue was solely whether Officer Blizzard's own conduct justified his downgrade and transfer.

Finally, Chief Bratton stated, "I have considered [Deputy] Chief Roupoli's testimony and agree that Officer Blizzard's lack of judgment in the unauthorized use of force, particularly given that the unauthorized force was against media members who were no threat to Blizzard, is further reason to keep Officer Blizzard out of Metropolitan Division and reject the request to transfer him back to Metropolitan Division. [¶] Officer Blizzard's misconduct, along with that of others in Metropolitan Division on May 1, 2007, brought public disgrace to the Los Angeles Police Department. The misconduct was filmed by news media and broadcast for days afterwards. The effects of Officer Blizzard's misconduct was not trivial to either the persons he struck, to the community, or to the Department."

9. *Petition for Writ of Administrative Mandate*

On December 10, 2009, Officer Blizzard challenged the Chief's decision by petition for writ of administrative mandate. Officer Blizzard raised three main arguments before the trial court: (1) the Exception in Department Manual Section 3/763.60 was not met, because the Department did not attempt to downgrade and transfer him immediately after the May Day misconduct, but instead waited for more than one year; (2) the weight of the evidence does not support the finding that he should be downgraded; and (3) the penalty imposed was excessive.

After briefing and a hearing, the trial court denied the petition. The court concluded: (1) Officer Blizzard waived any contention that his downgrade and transfer were too untimely to satisfy the Exception, by failing to raise it before the hearing officer; (2) substantial evidence, in the form of the guilty finding of two counts of misconduct, supported the downgrade; and (3) there was no abuse of discretion in the imposition of the penalty of downgrade and transfer.

Judgment was entered accordingly. Officer Blizzard filed a timely notice of appeal.

CONTENTIONS ON APPEAL

On appeal, Officer Blizzard argues that the Exception was not met. The Department responds that this contention was waived by Officer Blizzard's failure to raise it before the hearing officer. We conclude that Officer Blizzard's argument has merit, and was not, in fact, waived. Turning to the issue of remedy, Officer Blizzard argues that he is entitled to a writ of administrative mandate directing the Department to reinstate him as a P.O. III at Metropolitan Division with full back pay. The Department responds that the proper remedy in these circumstances is a remand for a new hearing and decision by the Chief of Police. We conclude that, under the circumstances of this case, the Department is not entitled to a second chance to meet its burden of proof, and we will therefore direct the trial court to issue a writ of mandate.

DISCUSSION

1. Standard of Review

A final administrative decision is reviewable by administrative mandate. Code of Civil Procedure section 1094.5, subdivision (b) provides that judicial review of such a decision shall “extend to the questions whether the [Board] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.”

2. There was no Evidence that the Exception was Met

In 2002, it was held that a police officer has a due process property interest in a particular pay grade. (*Brown v. City of Los Angeles, supra*, 102 Cal.App.4th at pp. 170-172; *Los Angeles Police Protective League v. City of Los Angeles, supra*, 102 Cal.App.4th at p. 91.) Thus, certain due process protections must be afforded an officer being administratively downgraded. Specifically, the Department must shoulder the burden of proof at the administrative hearing and is required to establish the requirements for a reduction in pay grade as set out in Department Manual section 3/763.60. (*Brown v. City of Los Angeles, supra*, 102 Cal.App.4th at pp. 175-176; *Los Angeles Police Protective League v. City of Los Angeles, supra*, 102 Cal.App.4th at pp. 92-93.) Moreover, although the Chief of Police has discretion to disagree with the hearing officer’s recommendation, the Chief’s decision must “be based on an application of the pertinent substantive criteria.” (*Brown v. City of*

Los Angeles, supra, 102 Cal.App.4th at p. 177.) In other words, the Chief of Police cannot simply uphold a transfer and downgrade without sufficient evidence, at the hearing, establishing the requirements for a transfer and downgrade.

As it is undisputed that the Department proceeded under the Exception set forth in Department Manual section 3/763.60, the Department bore the burden of establishing the requirements for a reduction in pay grade as set forth in the Exception. The Exception allows for an immediate downgrade of an officer, without an opportunity to correct the misconduct, when “an officer clearly demonstrated [*sic*] failure or inability to satisfactorily perform the duties of his or her advanced paygrade position, indicate the need for an immediate reassignment in the best interests of the Department.” Yet the Department introduced no evidence whatsoever on the issue of whether Officer Blizzard’s misconduct indicated the need for an immediate reassignment; and Chief Bratton similarly failed to address the issue in his decision.

The Department argues, however, that Blizzard cannot contest the Department’s failure of proof on the issue as Blizzard failed to timely raise the issue at the hearing. In other words, the Department contends that Blizzard failed to exhaust his administrative remedies with respect to the issue of whether the requirements of the Exception were established.²⁴ We disagree. It is true that a petitioner cannot generally seek a writ of

²⁴ The Department attempts to characterize the issue as whether the Department *acted timely* in transferring and downgrading Blizzard, not whether the Department established that the requirements of the Exception had been met. Thus, the Department argues that “[b]efore the [hearing officer,] [Blizzard] never argued that the Department acted in an untimely manner.” This is an incorrect characterization. The issue is not

administrative mandate on a theory the party did not pursue before the administrative tribunal. (*NBS Imaging Systems, Inc. v. State Bd. of Control* (1997) 60 Cal.App.4th 328, 336-337.) “The essence of the exhaustion [of administrative remedies] doctrine is the public agency’s opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.” (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Yet this rule relates to arguments which the petitioner had the duty to raise at the administrative level. In this case, by contrast, the argument is one of failure of proof on an element on which the Department bore the burden of proof. It cannot be said that Blizzard failed to exhaust his administrative remedies with respect to the Department’s failure to introduce evidence that his failure to perform his duties on May 1, 2007 “indicate[d] the need for an immediate reassignment,” as Blizzard was not obligated to raise this issue before the hearing officer. The Department bore the burden of proof on the issue, and this was so even if Blizzard remained completely silent at the administrative hearing. In this regard, we conclude the situation is analogous to that of an appellant who has not challenged before the trial court the respondent’s failure to introduce sufficient evidence on a point on which the respondent had the burden of proof. There is no waiver of the contention on appeal, as the appellant had no burden to challenge the respondent’s evidence before the trial court. (See *In re Brian P.* (2002) 99 Cal.App.4th 616, 623 [“ ‘Generally, points not urged in the trial court cannot be raised on appeal. [Citation.]

one of an affirmative defense of untimeliness, but an issue of whether the Department met its burden of proof on all elements of the Exception.

The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule.’ [Citations.]”)) As the Department bore the burden of proof on this issue, Officer Blizzard could not have waived the requirement that the Department meet its burden with substantial evidence.²⁵

3. *The Department is Not Entitled to a Rehearing*

Given the Department’s failure to prove an element necessary for Blizzard’s downgrade and transfer to be upheld, we sought additional briefing on whether the proper remedy is to remand for a rehearing. The Department argues that a rehearing is proper, while Blizzard contends he is entitled to reinstatement without a new hearing. Under the circumstances, Blizzard has the better argument.

In *Voices of the Wetlands v. State Water Resources Control Bd.* (2011)

52 Cal.4th 499 (*Voices of the Westlands*), the Supreme Court considered a case in which the trial court, concluding that one of the numerous findings of a regional water board in

²⁵ As we conclude the Department’s failure of proof with regard to this element is fatal, we need not address Blizzard’s other challenges to his downgrade and transfer in this case. We note, however, that there are at least two other areas of concern. First, it is apparent that Deputy Chief Roupoli’s opinion was based on all seven purported acts of misconduct, not merely the two of which Officer Blizzard was found guilty. In *Brown v. City of Los Angeles*, *supra*, 102 Cal.App.4th at p. 179, the court held that the Department is collaterally estopped from basing a reduction in pay grade on charges as to which an officer was exonerated by a Board of Rights. Thus, to the extent Deputy Chief Roupoli’s opinion was based, in whole or in part, on the five charges of which Officer Blizzard was acquitted, it was improper, and the Chief of Police should not have relied upon it. Second, to the extent the Chief of Police relied on the fact that Officer Blizzard’s misconduct, and that of other officers, “was filmed by news media and broadcast for days afterwards,” this was similarly inappropriate. There was no evidence at the hearing that the misconduct had been broadcast by the media, and it therefore should not have been considered by the Chief. In any event, we question the propriety of basing a downgrade decision on whether an officer had the random misfortune to have had his misconduct broadcast on television.

granting a permit was not supported by the weight of the evidence, remanded for a further hearing on the issue. (*Id.* at p. 512.) After “[v]oluminous materials” were provided to the board on rehearing, the board reinstated its earlier finding. (*Id.* at p. 513.) An environmental organization challenging the issuance of the permit sought administrative mandate, arguing that the initial remand was improper and that once the trial court had concluded that the board’s finding was not supported by sufficient evidence, its only choice was to issue the writ and set aside the permit. (*Id.* at p. 525.) The Supreme Court disagreed, concluding that the remand was proper, and that Code of Civil Procedure section 1094.5 does not preclude an administrative agency, on remand, from “considering additional evidence to fill the gap the court has identified.” (*Id.* at p. 526.) The court noted, however, that two earlier cases, *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344 (*Ashford*) and *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41 (*Newman*) reached the contrary result on different facts. *Ashford* and *Newman* each involved the termination of a public employee where there was insufficient evidence for the termination introduced at the hearing. (*Ashford, supra*, 130 Cal.App.4th at p. 346; *Newman, supra*, 10 Cal.App.4th at p. 46.) In *Voices of the Wetlands*, the Supreme Court stated that *Ashford* and *Newman* “illustrate circumstances in which due process principles entirely separate from section 1094.5 may preclude successive administrative proceedings. It may well be, as *Ashford* and *Newman* suggested, that there should be no second chance to muster sufficient evidence to impose administrative sanctions on a fundamental or vested right,

such as the right against dismissal from tenured public employment except upon good cause.” (*Voices of the Wetlands, supra*, 52 Cal.4th at p. 534.)

We conclude that the *Ashford* and *Newman* exception suggested in *Voices of the Wetlands* applies in this case. A police officer has a “property interest within the meaning of the due process clause” in a particular pay grade. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th at p. 171.) This is not a permit case like *Voices of the Wetlands*, in which, had the court directed that the permit be denied due to insufficient evidence, the parties would have simply commenced a new permit process and submitted all of their additional evidence. (*Id.* at p. 531.) The due process protections would be hollow indeed if a Department could conduct rehearing after rehearing until such time as it introduces sufficient evidence to justify its downgrade decision. Due process guarantees that the Department bear the burden of establishing that the downgrade was proper under Department Manual section 3/763.60. A necessary corollary of this guarantee is that if the burden has not been satisfied, the downgrade must be set aside.

DISPOSITION

The judgment denying the petition for writ of administrative mandate is reversed. The matter is remanded to the trial court with directions to issue a writ directing the Department to set aside its decision upholding Blizzard's downgrade and transfer, and to award Blizzard the back pay to which he is entitled. Blizzard shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.